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In the
SUPREME COURT OF THE UNITED STATES

October Term, ~~1949~~ ~~1950~~ 1951

No. ~~484~~ 34

GEORGIA RAILROAD & BANKING COMPANY,
Appellant,
v.
CHARLES D. REDWINE,
STATE REVENUE COMMISSIONER,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Brief for Appellee

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STATEMENT OF THE CASE

In the judgment of counsel for the Appellee, a more complete statement of the case will make possible a more lucid and logical development of the principles relied upon to sustain the judgment of the District Court.

This appeal is from the decision [1] of a three judge District Court dismissing the complaint of the Georgia Railroad & Banking Company against Charles D. Redwine, who is Revenue Commissioner of Georgia, for the reason that it is a suit which, in substance and effect, is against the State of Georgia, and to which that State has not consented. The avowed purpose of that suit was to implement and enforce a decree rendered by the Circuit Court of the United States for the

[1] *Ga. R. R. & Bkg. Co. v. Redwine*, 85 F. Supp. 749.

Northern District of Georgia on July 3, 1907, in *Georgia Railroad & Banking Company v. Wright* [2], 132 Fed. 912, as modified and affirmed by this Court in *Wright v. Georgia Railroad & Banking Company* [2], 216 U. S. 420, (R. 1, Par. 4 of Complaint). The injunction is sought against Redwine as a wrongdoer.

THE WRIGHT CASE

The Wright case began when, on January 7, 1904, the Georgia Railroad & Banking Company filed complaint in the Circuit Court of the United States for the Northern District of Georgia against "William A. Wright, a citizen of the State of Georgia, resident of the Northern District thereof, in the City of Atlanta." (R. 29.) By this bill of complaint it was alleged that William A. Wright was the Comptroller-General of Georgia, (R. 32, Par. 14 of Complaint), and that "William A. Wright, who is the Comptroller-General of the State of Georgia, acting as such Comptroller-General, insists that your orator shall pay to the State of Georgia, to fifteen counties of said State, and numerous municipalities through which your orator's said railroad passes, a property tax on—($1,990,756.00) dollars said sum representing the alleged excess in value of your orator's investments in its said railroad over and above the par of your orator's capital stock—the tax thus demanded being for the year 1903 $20,000 or other large sum." (R. 34, Par. 20 of Complaint.)

The bill of complaint further alleged that the defendant's efforts to collect these taxes were based upon the Act of the Legislature of Georgia of December 17, 1902, and that "said threatened action of said Comptroller-General and said Act of the Legislature of Georgia of December 17, 1902, would impair the obligation of said contract, and are unconstitutional, null and void under Paragraph 1 of Article 10 of the Amendments to the Constitution of the United States." (R. 35, Par. 23 of Complaint.) Other allegations of the bill make it clear that the contract which Georgia Railroad &

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[2] For convenience, this case will be hereafter referred to throughout as the "Wright Case." No other case will be so identified.

Banking Company thus sought to protect was its perpetual charter granted by legislative enactment and which it claimed to be a contract forever limiting its obligation to pay taxes.

The prayers of the complainant were that it be adjudged "not liable for a property tax on its railroads aforesaid or any tax on its franchises, and that the only tax for which your orator is liable is a tax to the State only, not to exceed one-half of one per cent of the net earnings of this orator's investments in its railroads," and that "the said William A. Wright, Comptroller-General, be enjoined from issuing any execution or taking any step to collect any tax from your orator other than one-half of one per cent of the net earnings of its investments or any tax on your orator's franchise," and for "other and further relief such as the case may require and equity may afford." (R. 37.)

Service of subpoena was acknowledged "William A. Wright, by John C. Hart, attorney at law and Attorney General of Georgia." (R. 41.) Various responsive pleadings were filed, in the caption of which the Georgia Railroad & Banking Company is shown as Plaintiff, and William A. Wright is shown as Defendant. By demurrer defendant made the point, among others, that "said bill upon its face shows the same to be a suit between a citizen of the State of Georgia and said State, or a citizen thereof, and no federal question is presented by said bill." (R. 45.) All demurrers were overruled (R. 73) and, after hearing, the Circuit Court rendered a decree adjudging that the Act of December 21, 1833, was a valid and binding contract between the State of Georgia and the Georgia Railroad & Banking Company, and that this charter provided a system of taxation exclusive of all other taxation, and decreed that "defendant be perpetually enjoined from levying and collecting any taxes, State, county or municipal, from said complainants not in accordance with this decree." (R. 84-85.)

Defendant assigned errors upon a number of points, including an assignment that the Court erred "in not sustaining the first paragraph of respondent's demurrer to the bill as amended alleging that the amended bill presented no federal

question, was a suit between citizens of the same State, and the Court was without jurisdiction; . . ." (R. 89.)

In the opinion accompanying his decree, Circuit Judge Newman made no reference to Georgia's sovereign immunity from suit.

Appeal was perfected to this Court, and this Court affirmed the judgment of the Circuit Court with slight modification not here material. *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420. In its opinion, this Court did not deal with the question of sovereign immunity from suit, and throughout treats the suit as though Georgia were fully and properly a party thereto.

STATE DECLARATORY JUDGMENT SUIT

In 1945, acting pursuant to the mandate contained in the Georgia Constitution of 1945, the then Revenue Commissioner of Georgia called upon Appellant to make tax returns and expressed it as his purpose to assess property taxes against Appellant upon all of its property and upon its franchises.

Georgia Railroad & Banking Company thereupon sought, by suit in the State courts of Georgia, declaratory and injunctive relief against the threatened assessment. This relief was denied. *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139. App. dis., 335 U.S. 900.

THE CASE AT BAR

Thereupon, Georgia Railroad & Banking Company filed the suit at bar against Appellee, alleging the continued threats of Charles D. Redwine, the present Revenue Commissioner of Georgia, to assess and undertake to collect property taxes, and describing the instant case as an "ancillary and supplemental action to enforce and carry out the previous decree of this Court," (R. 1), namely that rendered by Circuit Judge Newman in the *Wright Case*, supra, as subsequently affirmed with modification by this Court.

Redwine answered by setting up various defenses in fact and in law, and moved the dismissal of the complaint, for

the reason and upon the ground that the suit was, in substance and effect, a suit against the State of Georgia, prohibited by the Eleventh Amendment to the Constitution, and that the State had not consented to be thus sued. (R. 10.)

The case was brought on for a hearing before a three judge District Court constituted as provided in Title 28 U.S.C., Sec. 2281, upon Appellant's motion for a summary judgment, which motion in turn rested upon the pleadings and the response to a request for admissions, as well as upon the Appellee's motion to dismiss. The District Court concluded that the action was, in its purpose and effect, a suit against the State of Georgia, that Georgia had not consented to be sued, and that the judicial power of the United States District Court did not extend to such a suit. (R. 170.) The District Court decided none of the other questions made by the pleadings.

The preceding statement includes only certain of the facts set out in the pleadings or in the proof made by Appellant in support of its motion for summary judgment. Although somewhat more detailed, it is not intended as a statement of all procedural and evidentiary facts in the several suits which are pertinent to the legal issues presented by this appeal. It is primarily intended to serve as a frame of reference for the statement of questions presented and Appellee's positions thereon.

SUMMARY OF ARGUMENT

I.

The judgment of the District Court dismissing the complaint was proper, for the reason that the suit was, in substance and effect, one against the State. As a matter of law, Georgia had not consented to be sued. No action taken by Wright, then Comptroller-General, in the *Wright case,* supra, by way of defending that suit, or by the Governor in permitting its defense, or in directing its defense (if he did so direct it), or by the Attorney General in participating in the case, constituted a waiver of the sovereign immunity which the State of Georgia enjoys under the Eleventh Amendment.

The Governor, the Attorney General, and the Comptroller-General were without power or authority to waive Georgia's sovereign immunity, this power being subject to exercise only by the Legislature. Georgia did not, by inaction or acquiescence in the decision rendered in the *Wright case,* become estopped from raising the issue of sovereign immunity from suit in the case at bar, nor did Redwine who is Georgia's Revenue Commissioner, become estopped from raising the issue that a suit nominally against him is, in legal effect, a forbidden suit against the State. The judgment in the *Wright case,* supra, did not and does not bind the State of Georgia, because it had not consented to be bound, nor does that judgment bind Redwine, personally or officially, there being no privity between Wright, the former Comptroller-General, and Redwine, the present Revenue Commissioner.

II.

The District Court's judgment of dismissal was proper for the further reason that plain, speedy, and efficient remedies are provided by Georgia: by appeal from any adverse decision of the Revenue Commissioner upon the question of taxability; by payment of any taxes assessed on behalf of the State of Georgia, and suit for refund; by statutory affidavit of illegality; and, if the foregoing remedies prove inadequate, by suit in equity in the Superior Court of Fulton County, Georgia.

III.

In no event should the District Court have sustained Appellant's motion for summary judgment. Considered either as a bill for relief ancillary to the judgment in the *Wright case,* supra, or as a new and independent suit, Appellant demonstrates no legal right to have relief because the Legislature was without authority when the first charter was granted and at all times thereafter material to this suit, to enter into a perpetual contract on behalf of the State of Georgia alienating a portion of the sovereignty of that State. Properly construed, the Georgia Constitution of 1798 expressly forbade the Legislature to exercise such power, and

prior to the passage of the first Act incorporating and chartering Appellant, and since that Act, the Supreme Court of Georgia has repeatedly construed the Legislature's power as being so limited. In addition to the judicial constructions on legislative power in this particular, both the legislature and the electorate have interpreted and enunciated this same lack of legislative power by enactment of the Constitution of 1877 and that of 1945. Language in decisions apparently to the contrary does not foreclose this issue, because such expressions were either *obiter dicta*, or contained in suits to which the State was not a party.

So much of the several acts of incorporation as purport to grant Appellant a perpetual limitation upon its tax obligations, if valid when enacted, were subsequently rendered unconstitutional and void by the adoption of the Fourteenth Amendment to the Constitution of the United States as denying to other taxpayers and other classes of taxpayers the equal protection of the laws.

Should it be determined that this charter constituted a valid contract of tax limitation when granted and accepted and that it has not subsequently been rendered void by the adoption of the Fourteenth Amendment, Appellant should, nevertheless, have been denied the summary relief sought, for the reason that Appellant has failed to show a compliance with its obligations under that contract and has, in fact, failed to perform its obligations under that contract, thereby forfeiting its right to tax limitations.

IV.

Finally, if entitled to any summary relief, Appellant is not entitled to all of the summary relief asked, for the reason that the 67 mile branch from Madison to Atlanta was never included within the scope of the tax limitation provisions.

I. THE JUDGMENT OF THE DISTRICT COURT DISMISSING THE COMPLAINT WAS PROPER FOR THE REASON THAT THE SUIT WAS, IN SUBSTANCE AND EF-

FECT, ONE AGAINST THE STATE OF GEORGIA.

The action is directed against the Commissioner of Revenue acting as an individual, and not as an officer of the State Government, Appellant contending that it seeks to prevent a tort by the Commissioner and that equitable relief is necessary because Appellant has no adequate remedy at law. Appellee contends that, regardless of the nominal parties to the suit, it is against the State, because Appellant seeks to enforce what it claims to be a contract with the State, and the State being a pary to the purported contract is, therefore, an indispensable party to the suit.

a. The case at bar, when considered as an independent suit, is, in effect, against the State.

As a party to the alleged contract, the State, as a corporate entity, has a distinct and direct interest in the subject matter of the litigation. *Musgrove v. Georgia Railroad & Banking Co.*, 204 Ga. 139, App. dis., 335 U. S. 900.

If the relief prayed is granted, the alleged contract between Georgia and the Georgia Railroad & Banking Company will be enforced. In the language of Mr. Justice Matthews in *Hagood v. Southern*, 117 U. S. 52, 67:

> "... The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States. ..."

It may truly be said here, as was said by Mr. Justice Miller for this Court in *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U. S. 446, 457:

> "The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia. . ."

Georgia may not be coerced by judicial action without

being a party to the suit. *Louisiana v. Jumel*, 107 U. S. 711. The suit raises questions of law and fact upon which the State of Georgia would have to be heard. The State's liability cannot be tried "behind its back." *Louisiana v. Garfield*, 211 U.S. 70. *Mine Safety Appliance Co. v. Forrestal*, 326 U.S. 371.

The grant of the injunction prayed would be substantially a decree directing specific performance of the contract which Appellant contends exists between it and the State of Georgia. Such a suit may no more be maintained against the Revenue Commissioner in his personal and individual capacity than it might be maintained directly against the State of Georgia. *In Re Ayers*, 123 U. S. 443.

Appellant contends that this action is not against the State, and relies upon *Looney v. Crane Company*, 245 U.S. 178, *Allen v. B. & O. Railroad Company*, 114 U. S. 311, *Gunter v. Atlantic Coast Line Railroad*, 200 U. S. 273, and the *Board of Liquidation v. McComb*, 92 U. S. 531.

Appellee, on the other hand, insists that none of these decisions require a decision against it, as a brief analysis will show.

Looney v. Crane, supra, involved no contract or other corporate rights of the State and, therefore the State was not an indispensable party for the purpose of determining the constitutionality of the tax statute there under attack.

Allen v. B. & O. Railroad, supra, was one of the Virginia Coupon Cases. All of the coupon cases related to a Virginia statute authorizing the coupons of the State's funded debt to be received in payment of taxes, debts and demands due the State. Subsequent legislation practically forbade the receipt of these coupons in payment of taxes, and placed upon the holders the onerous task of making proof of their genuineness under procedure and rules of evidence which made this proof exceedingly difficult, if not impossible.

The Court was concerned with the same statutes and with the same coupons in the *Allen case* and in the *Ayers case*, supra.

In *Allen v. B. & O. Railroad*, supra, an injunction was granted restraining Allen, who was the Auditor of Public

Accounts, and the other Virginia officers, from collection of taxes by distraint upon the property of the Railroad, after the Railroad had tendered coupons in payment of these taxes. Such a suit was not within the prohibition of the Eleventh Amendment.

In the *Ayers case*, temporary restraining order had been granted against Ayers, who was Attorney General, at the suit of investors holding coupons for resale, which investors were not Virginia tax payers, restraining the institution of suits to collect taxes against those who had tendered tax coupons in payment of their taxes. Ayers was adjudged in contempt for instituting a suit, and sought his release by habeas corpus, contending that the restraining order was, in substance and effect, against the State in a suit brought without its consent.

Appellant suggests and argues that the distinction between suits which are prohibited as in substance against the State, and those which are permitted upon the theory that they are only against officers of the State acting beyond their valid authority, may be determined by comparing the *Ayers case* and the *Allen case*. Appellant further argues that in the *Ayers case*, the order of the Court was void because directing the Attorney General to dismiss suits, an act which he could do only by virtue of the powers of his office.

The two cases may not be distinguished for this reason. In the first place, it is not factually correct. The temporary restraint which this Court held to be void, did not require affirmative action.[3]

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[3] This court, in Ex Parte Ayers, 123 U. S. 443, at page 484, quotes the full text of the temporary restraining order which the Attorney General was cited for violating:

"Circuit Court of the United States for the Eastern Districts of Virginia.

"James P. Cooper, H. R. Beston, F. J. Burt, N. J. Chinnery, W. M. Chinnery, F. P. Leon, and W. G. Woolston,

against

"Morton Marye, Auditor, R. A. Ayers, Attorney General, the Treasurers of Counties, Cities and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities and Towns in said State, whose names complainants have leave to insert as they may be discovered.

"Upon reading the bill of the complainants, it is ordered that Morton

Appellee respectfully insists that the distinction between the *Allen case* and the *Ayers case* rests upon the familiar principle that when authority to act is exceeded, action by the officer beyond his authority is personal action only.

In the *Allen case*, payment of taxes by coupons had been tendered, and the Court regarded this tender as being equivalent to payment for the purpose of that suit. Tax collectors have no authority to distrain for taxes which have been paid. On the other hand, the authority of the Attorney General to maintain a suit in behalf of the State is not limited to those suits where the State is entitled to prevail. The opinions in both the *Allen case* and the *Ayers case* were written by Mr. Justice Matthews, and every Justice who participated in the *Ayers case* also participated in the earlier *Allen case*. This Court apparently distinguished the *Ayers case* from the *Allen case* on the basis here suggested.[4]

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[4] The following excerpts are taken from the majority opinion of Mr. Justice Matthews *In Re Ayers*, 123 U. S. 443, at page 495: "It seems to be supposed in the argument, that the right of taxpayers in Virginia, who have tendered tax-receivable coupons in payment of their taxes to the proper collecting officer, to be forever thereafter free from suit by the State to recover judgment for such taxes, rests upon the

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Marye, Auditor, R. A. Ayers, Attorney General, each and every treasurer of a county, city, or town in the State of Virginia, and each and every Commonwealth attorney for a county, city, or town in said State, be restrained from bringing or commencing any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State, as provided for and directed by the act of the Legislature of Virginia, approved May 12, 1887, described in the bill, and of which a copy is attached thereto, and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court.

"And it is ordered that the motion for an injunction in this case be set down for hearing at the Circuit Court of the United States at Richmond, Virginia, on the first Monday in October next; provided that the Attorney General of the Stat, of Virginia, or either of the defendants, may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and provided further, that a copy of this bill and of this order be served on the Attorney General of the State of Virginia within ten days after the filing thereof."

"June 6, 1887."

Only Mr. Justice Harland dissented in the *Ayers case*, and the concluding paragraph of his dissent illuminates the basis for the distinction found by the majority. He justifies his dissent by the following language, taken from page 516 of the decision:

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proposition that such a tender is in law a payment of the taxes, so as to extinguish all claim for them on the part of the State. This proposition, indeed, is said to be justified by the authority of certain language in the opinion of this court in the case of *Poindexter v. Greenhow*, 114 U. S. 270. In that case the effect of a tender in payment of taxes upon the subsequent act of the collector in seizing the personal property of the tax-payer was considered and decided, but there is nothing in the opinion which countenances the idea that such a tender was a payment of the taxes, so as to extinguish all subsequent claim of the State therefor. Its effect was precisely defined in the following statement (page 299): 'His tender, as we have already seen, was quivalent to payment, so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property.'"

Again, at page 500 in the *Ayers case*, supra, this Court said: "The grounds of this jurisdiction were stated in *Allen v. B. & O. Railroad Company*. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in *Poindetxer v. Greenhow*, 114 U. S. 270, as follows (page 282): 'The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully with force and arms seized, taken, and detained the personal property of another.'"

Again, the Court said, at page 503 of the *Ayers case*: "The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, *only as they are considered to be the acts of the State of Virginia*." (emphasis supplied)

Again, at page 504 in the *Ayers case*, the Court states, upon authority of *Carter v. Greenhow*, 114 U. S. 317:

". . . that no direct action for the denial of the right secured by a contract, other than upon the contract itself, would lie under any provisions of the statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States."

"I repeat, that the difference between a suit against officers of the State enjoining them from seizing the property of the citizens in obedience to a void statute of the State and a suit to enjoin such officers from bringing under order of the State, and in Her name; an action which, it is alleged, will result in injury to the rights of complainant, is not a defense that affects the jurisdiction of the Court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class."

Appellant places much reliance upon *Gunter v. Atlantic Coast Line Railroad,* supra, upon this and upon other points for which it contends. Whatever may be the strength or weakness of the *Gunter case* on other points, it does not support plaintiff's contention that the action here maintained is against the individual rather than against the State. In the *Gunter case* the Court, to the contrary, regarded the action as one against South Carolina. The basis of the Gunter decision is made clear by language used at page 284 of the decision:

"As then, the State was not a party *eo nominee* in the Pegues case and as, although the suit was against officers it was not for that reason alone a suit against the State, it must follow that the ascertainment of whether the State was a party to that cause depends upon determining whether the taxing officers who were the nominal defendants were endowed by the State with the power, in a suit brought against them assailing the validity of taxes levied, to represent the State in the controversy so as to conclusively establish the rights of the State against the plaintiff if decree passed against him, and on the other hand to establish as against the State the rights of the plaintiff in that cause if decree passed in his favor. Thus the inquiry reduces itself to this: Did the State of South Carolina become, in substance and effect, a party to the Pegues case? In other words, did the State, through the authority which it had conferred

upon the defendant officers, voluntarily submit to judicial determination the question raised in the Pegues case concerning the alleged limitation of the taxing power of the State, arising from the contract on that subject which was asserted in that case?"

We take it as elementary that a State may, in granting its consent to be sued, provide by statute that the suit shall be nominally styled against one of its officers. *Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, 402, 403. The Court concluded that the statutes of South Carolina had that effect. We shall undertake to show in a later subdivision of this brief that the State of Georgia has never consented to suit upon this subject, either by action brought against the State as such or by action brought against one of its officers in the name of such officer.

Appellant finally relies upon the *Board of Liquidation v. McComb*, 92 U. S. 531. In the *McComb case*, McComb, a bond holder, entitled under Louisiana statute to participate in a composition settlement, sought injunction against the individuals composing the Board of Liquidation to prevent their admitting to participation certain junior bond holders whose participation would reduce the value of the funds and securities held in trust for effecting the compromise. The theory of the case was that the Board of Liquidation held these funds in trust for the interested parties, and that those in the position of McComb had a property interest in the fund, and the right to demand that the trustees maintain the financial worth of the trust interest of McComb and his associates against being diminished by the admission to participation of bond holders who were not legally entitled to participate. The State of Louisiana had no financial interest in the controversy between the holders of one issue of bonds and the holders of the other issue of bonds. No monetary relief as to such was asked against Louisiana. The event of the judgment would not result in the payment by Louisiana of more or less money to its creditors. Hence, it was not an essential party to the controversy.

The same statutes, and bonds of the same issue as those

held by McComb, were involved in the subsequent cases of *Louisiana v. Jumel* and *Elliott v. Wiltz*, 107 U. S. 711. Relief asked in the *Jumel case* was mandamus to require the several State officers named as parties defendant to "apply and pay to the extinguishment of the interest now due and payable upon the consolidated bonds of the State of Louisiana . . . all monies and proceeds of the tax levied or fixed by said Act (Act No. 3 of the year 1874)", then in the hands of defendants or either of them.

In *Elliott v. Wiltz*, supra, Elliott and others commenced this action in equity against the several officers of the State composing the Board of Liquidation.[5]

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[5] Complaints prayed that:

"It may be 'ordered, adjudged, and decreed" that the act No. 3, of 1874, 'so far as your orator's interests . . . are concerned, was at all times from its passage . . . a valid and subsisting law of the State of Louisiana; that the act aforesaid, the constitutional amendment of 1874, and the several bonds and coupons of interest, held and owned by your orators as aforesaid, separately and together, constituted, were, and are, good, valid, subsisting, and binding contracts between the State aforesaid and the bearers and holders of the consolidated bonds and coupons, the obligation of which contract cannot be lawfully or constitutionally impaired; and that, under and by virtue of such contract, your orators were and are entitled to take and enjoy all the rights, privileges, taxes, and moneys, particularly set forth and mentioned in act No. 3, and the constitutional amendment of 1874, aforesaid; that so much of the aforesaid Constitution of 1879 as alters, varies, modifies, or changes, or assumes, purports, or attempts to alter, vary, modify, or change, the provisions of the said act of 1874, and the constitutional amendment of that year, especially article 208 of the Constitution of the year 1879, and that portion of such Constitution known and distinguished as the ordinance on State debt, do impair the obligation of the contract herein above referred to; that the said parts and portions of such Constitution are, therefore, violative of the Constitution of the United States, and are absolutely null and void, and without the slightest force or effect whatever against complainants; and afford and offer no authority or warrant for the defendants, or any one or more of them, to make such disposition or application of any part or portion of the aforesaid taxes, and the proceeds thereof, collected and to be collected, as to enable the State, therewith, to defray the expenses of the State government, or to accomplish any purpose or purposes other than those prescribed in the aforesaid funding act, and constitutional amendment of 1874; that the defendants, and each of them, may be adjudged and decreed to replace and reinstate to the credit of said interest fund any moneys or funds that may have been diverted therefrom; . . . and that

In the majority opinion in *Louisiana v. Jumel* and *Elliott v. Wiltz*, supra, Chief Justice Waite discussed and distinguished *Board of Liquidation v. McComb*, supra; pointing out that the cases there dealt with arose under the same Act of the Legislature considered in the McComb case. A distinction between the two decisions was predicated upon the fact that in the earlier *Jumel case* the Board held the new issue of bonds in trust, and those who surrendered old obligations for new became beneficiaries under the trust with all the rights enjoyed by such beneficiaries. No such trust existed in *Louisiana v. Jumel* and *Elliott v. Wiltz*, supra. The Board owed no duty in respect to taxes. The Board owed no duty as trustees to do those things which the mandamus suit and suit for equitable relief sought to compel them to do.

In *Cunningham v. Macon & Brunswick Railroad Company*, supra, Mr. Justice Miller, in speaking for the majority, said of *Davis v. Gray*, 16 Wall. 203:

> "But it is clear that in enjoining the Governor of the State in the performance of one of his executive functions, the case (*David v. Gray, supra*) goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further. . ." (Bottom of page 453.)
>
> "The case of *Board of Liquidation v. McComb*, 92 U. S. 531, is to the same effect. . ." (Top of page 454.)
>
> "It is believed that this is as far as this court has gone in granting relief in this class of cases. . ." (Bottom of page 454).

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said defendants, and each and every one of them, may be preemptorily enjoined and restrained from recongizing as valid, against your orators, Art. 208 of the Constitution of Louisiana,' and the 'Debt Ordinance,' and 'from ignoring the Funding Act and constitutional amendment of 1874, and from doing, and causing to be done, any act or thing whatsoever obstructing, preventing, or impeding, or tending, directly or indirectly, to obstruct, prevent, or impede, in the slightest degree, the prompt, full, and complete execution and enforcement of the act and constitutional amendment aforesaid, and, finally, that the said defendants, and each and every one of them, may be enjoined and restrained to such other and further extent, and in such additional way and manner, as the court may deem right and proper.'"

"On the other hand, in the cases of *Louisiana v. Jumel* and *Elliott v. Wiltz*, 107 U. S. 711, decided at the last term, very ably argued and very fully considered, the Court declined to go any further. . ." (Page 455.)

"We think the foregoing cases mark with reasonable precision the limit of the power of the courts in cases affecting the rights of the State or federal governments in suits to which they are not voluntary parties." (Middle of page 456.)

There is a remarkable similarity between the relief sought in the case of *Elliott v. Wiltz*[5] and the relief granted in *Georgia Railroad & Banking Company v. Wright*, supra. The majority opinion in *Elliott v. Wiltz* concludes with the following language:

"When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose, but this is very far from authorizing the courts, when a State can not be sued, to set up its jurisdiction over the officers in charge of the public monies so as to restrict them against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

If judicial power did not extend to the grant of the relief prayed in the *Wiltz case*, it should not be exercised to supplement and enforce the judgment in the *Wright case* which purported to grant substantially similar relief.

Appellant likewise takes comfort in the fact that this Court has in many cases affirmed injunctions against State officials enjoining them from collecting taxes from railroad companies on the grounds that such action would impair a contract of exemption entered into by the State.

In none of the several cases which he cites did the opinion of the Court deal with the question of sovereign immunity from suit and, from all that appears from the decisions, the question was not presented.

While nothing in the opinion in *Humprey v. Pegues*, 16 Wall. 244, discloses the fact, Appellee insists that the statutes of the State there involved, namely, South Carolina, in effect waive sovereign immunity. The subsequent decision of this Court in *Gunter v. Atlantic Coast Line*, supra, so held.

b. When considered as ancillary to the *Wright case*, the case at bar is, in effect, against the State.

Appellee takes the position that the judgment rendered in the *Wright case* was, in substance and effect, against the State, however, not being formally made a party and not having consented to be bound by the judgment, may not have its rights prejudiced simply because its officer, when sued as an individual wrongdoer, failed to question the Court's jurisdiction to render a judgment operating upon the interests of the State. Just as the District Court said in its opinion, *Georgia Railroad & Banking Co. v. Redwine*, 85 F. Supp. 749, 754:

> "The question is, therefore, open and being now asserted in bar of the present proceeding, it must be sustained."

The decree of the Circuit Court in the *Wright case* which Appellant avowedly here seeks to implement and enforce (R.1, Par. 4 of Complaint and R. 9, Par. 3 of Prayer) purported to render declaratory relief. In part that decree provided:

> "Considered, ordered and adjudged by the Court that the Charter of the complainant, to-wit the Act of the Legislature of Georgia of December 21, 1833, and various other Acts of said Legislature passed prior to the first day of January, 1863, is a valid and binding contract between the State of Georgia and the complainant, the Georgia Railroad & Banking Company;
>
> " . . . . The said Charter provides a system of taxation for said property exclusive of all other taxation, to-wit: one-half of one percent of the net earnings of said property."

The interest of the State of Georgia in the issues thus adjudged can hardly be questioned, and it is just as indispensable a party to the grant of declaratory relief adjudging that a valid contract exists to which it is a party and determining the duties and obligations under this contract, as it would be to a suit on that contract to compel its specific performance. *Musgrove v. Georgia Railroad & Banking Company*, supra.

This Court, in marginal note 9 to *Larson v. Foreign and Domestic Commerce Corporation*, 337 U. S. 682, at page 689, clearly pointed out the lack of judicial power to render this type of declaratory relief against a non-consenting State. There it was said:

> "The complainant also asks for declaratory relief even more clearly directed at the sovereign. It was asked that this court declare that 'the sale of this coal . . . is still valid and in effect.' The administrator, an agent for a disclosed principal, was not a party to the contract of sale. See 2 Restatement, Agency (1933) Section 320. The request for an adjudication of the validity of the sale was thus, even in form, a request for an adjudication against the sovereign. Such a declaration of the rights of respondent *vis-a-vis* the United States would clearly have been beyond the court's jurisdiction. See *Stanley v. Schwalby*, (1869,) 162 U.S. 255. We do not rest our conclusion here on the request for such a declaration, since the District Court could have granted only the injunctive relief requested."

Clearly, that part of the judgment in the *Wright case* which Appellant now seeks to implement and enforce is the portion which purports to be declaratory of the contractual rights of Georgia Railroad & Banking Company *vis-a-vis* the State of Georgia.

c. No action of the Comptroller General, the Governor, or the Attorney General in connection with the *Wright case* constituted consent of Georgia to be sued or bound by the judgment in the *Wright case*.

All of these officers were without authority to consent for Georgia.

Counsel for appellant flatly states that a State may not participate in litigation and take its chances of winning, and then later take the position that it was not bound on account of the 11th Amendment. It is their view that the defense by the Attorney General of the suit of *Georgia Railroad & Banking Company v. Wright* in the Circuit Court constituted such State participation. In support of this contention they rely upon *Gunter v. Atlantic Coast Line*, supra, *Gardner v. New Jersey*, 329 U. S. 565, and *Clark v. Barnard*, 108 U. S. 436. This reliance is misplaced.

The *Gardner* and the *Clark cases* were both concerned with an assertion on behalf of the states involved of a claim upon a fund in Court. As Mr. Justice Douglas has tersely stated in the *Gardner case*:

> "If the claimant (to a part of the fund in court) is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the Court entertains objection to the claim."

New Jersey in the *Gardner case*, and South Carolina in the Clark case, had each become actors. They were asserting claims, not having claims asserted against them.

The *Gunter case*, as we shall hereinafter undertake to show, did not turn upon participation, considered apart from statutory authority and direction to participate, as constituting a waiver, but turned rather upon the fact that by legislative action suit, in substance against the State had been authorized by an action nominally taken against one of the officers of the State. The Attorney General's participation was pertinent only as showing a contemporaneous administrative interpretation of the meaning and extent of his statutory authority.

In *State of Missouri v. Fiske*, 290 U. S. 18, this Court dealt with the same contention that is here made by appellant, and readily struck it down. There, Missouri had intervened as

a party-defendant in a pending suit in the District Court, asking that certain shares of stock in the hands of that Court's trustee be not disturbed until an adjudication of ownership be made in a pending suit in the Court of Probate of that State. One of the original parties promptly filed an ancillary bill seeking to have the Court determine the stock ownership as between the State of Missouri and other claimants. The Court concluded that the intervention was too limited in character to constitute a waiver of the immunity given by the 11th Amendment. The fact that that suit was ancillary and supplemental to one in which the Court had admitted jurisdiction of the original parties and a limited jurisdiction of Missouri gave the case no better standing as against a claim of immunity under the 11th Amendment. Nor did the fact that the suit was there in rem furnish ground for the issue of a process against a non-consenting State.

Carr v. United States, 98 U. S. 433, is on all fours with the case at bar upon this point. There, in ejectment brought against one who held title as an agent of the United States and whose possession was only for the purpose of asserting its claim of title and right of possession, the District Attorney and other counsel employed and directed by the Secretary of Treasury appeared in defending. In a subsequent action, this Court said that their participation was legally insufficient to preclude the United States by the judgment. With regard to the action of the Secretary of the Treasury, the Court said:

> "He may have deemed it prudent to assist the officers who were sued without intending to waive any of the rights of the government."

The record in the case at bar justifies a similar statement with regard to the action of the Governor in directing the defense of Wright's case, if he did so in fact direct its defense, and the action of the Attorney General in appearing as counsel for that defendant. It might also be as truly said of the power of the Governor, Comptroller-General, and Attorney General, as was said in the *Carr case* of the power of the Secretary of

the Treasury and the District Attorney, "and in fact (they) had no authority to waive those rights."

The judgment in the *Wright* case, if it had any validity, was binding only upon Wright, as an individual. The judgment did not and could not bind the State of Georgia because the State's immunity from such a suit had not been relinquished by the Georgia Legislature, the only authority capable of waiving or relinquishing such immunity.

Appellant states that the *Wright case* was defended by the Attorney General of Georgia, with the approval and direction of the Governor. The record does not disclose such approval or direction. However, even if there was such a direction, it could not operate to waive State immunity; only the Legislature has that authority.

In *Western Union Telegraph Company v. Western and Atlantic Railroad Company*, 142 Ga. 532, the Supreme Court of Georgia stated at page 535: "The State cannot be sued or subjected to an action of any kind, without special legislative authority."

Again, in *Roberts v. Barwick*, 187 Ga. 691, at page 696, the Court quotes with approval from the decision in *Atlantic and Western Railroad v. Carlton*, 28 Ga. 180 (2), as follows: "In such cases in England, the King is petitioned in his court of chancery, and the chancellor administers right as a matter of grace, not by compulsion. Here the usual course pursued by the citizens has been to petition the legislature; and that has been the resort when no other remedy has been provided."

And in *Cannon v. Montgomery*, 184, Ga. 588, at page 591, the Court states: "A suit can not be maintained against the State without its statutory consent."

Appellant does not contend that any statute effected a waiver of sovereign immunity so as to make the former suit

against Wright a suit against the State of Georgia. Appellant does, however, contend that the participation of the Attorney General in the Wright case effects a waiver of immunity. A short answer to this contention is, again, there is no statute authorizing the Attorney General to waive sovereign immunity. It has been held that the Attorney General has only those powers specifically given him by statute, and he has no authority to perform any act not authorized by statute. *Walker v. Georgia Railroad & Power Co.*, 146 Ga. 655, at page 656.

Administrative interpretation placed upon the statutory authority of the Attorney General has been that he has no authority to waive the State's immunity from suit. M. J. Yeomans, then Attorney General of Georgia, in an address on the History, Powers and Duties of the Attorney General, reported in the 54th Annual Session of the *Georgia Bar Association Proceedings of 1937*, at page 245, listed among the acts which the Attorney General of the State might not perform, the following: "He cannot consent for the State to be sued. . . The Attorney General has no such authority. Neither has any other State officer. A consent on the part of the State to be sued must be found in some legislative enactment."

In the absence of statutory waiver of State immunity from suit affecting the *Wright case*, and in the complete absence of authorization to Wright, the Attorney General, or the Governor to waive statutory immunity and permit a final adjudication of the issue in controversy, it is clear that the *Wright case* was not and is not binding upon the State of Georgia.

Appellant contends that the Georgia statutes providing that it is the duty of the Attorney General to represent the State in all civil and criminal cases in any court when required by the Governor constitute statutory authority and waiver of State immunity.

As it happens, a State statute almost exactly identical to the Georgia statute has been considered by this Court on the exact point raised by Appellant. In *Ford Motor Company v. Department of Treasury*, 323 U. S. 459, at pages 466, 468, this Court considered the Indiana statute which provides:

> "It shall be the duty of the attorney-general to represent the department, and/or the state of Indiana, in all legal matters or litigation, either criminal or civil, relating to the enforcement, construction, application and administration of this act, upon the order and under the direction of the department."

The Court said:

> "Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued. State court decisions construe strictly the statutory powers conferred on the Indiana state attorney general and hold that he exercises only those powers 'delegated' to him by statute and does not possess the powers of an attorney general at 'common law.' It would seem, therefore, that no properly authorized executive or administrative officer of the State has waived the state's immunity to suit in the federal courts."

It should be noted that the Indiana State Court decision holding that the Attorney General has only those powers specifically given him by statute has its exact counterpart in the Georgia State decision concerning the Georgia Attorney Gen-

eral's powers, in *Walker v. Georgia Railroad & Power Co.*, 146 Ga. 655, at page 656.

Finally, the contention that the Attorney General's appearance in the *Wright case* did not waive State immunity from suit is supported by *Stanley v. Schwalby*, 162 U.S. 255, where this Court held that the fact that a United States Attorney had filed an answer to a suit under instructions by the Attorney General did not bind the United States, nor waive its immunity.

It should be noted that the Governor has the power to provide for the defense of individuals, where the State has an interest. Clearly this cannot constitute a waiver of immunity.

As authority for the proposition that the appearance of the Attorney General on behalf of the State makes the State in effect a party to the action, Appellant cites *Mayo v. Renfroe*, 66 Ga. 408; *Hart v. Atlanta Terminal Company*, 128 Ga. 754; and, *Trust Company of Georgia v. Georgia*, 109 Ga. 736.

References made in the *Mayo case*, supra, to the effect of the Attorney General's appearance are clearly make-weight, the Court ruling in that case that the Governor was neither a proper nor necessary party-defendant to an equitable action brought against a Sheriff to prevent levy of an execution issued by the Governor. The point was also made that the venue of this equitable action was improperly laid in the county of the Sheriff's residence, the Governor being the only person against whom substantial equitable relief was prayed. The true meaning of the holding in the *Mayo case* upon this point is stated by the Supreme Court of Georgia in *Railroad Commission v. Palmer*, 124 Ga. 633, where the Court, at page 647, said:

"In each of the cases of *Wright v. Southwestern Railroad Company*, 64 Ga. 794, and *Mayo v. Renfroe*, 66 Ga. 408, the State was a substantial party in whose behalf the execution was proceeding; and as it could not be sued, and therefore the venue could not be fixed with regard to it, it was held that a bill to enjoin the levy could be brought in the County of the residence of the Sheriff who was proceeding to act."

In the *Mayo case*, the State's sovereign immunity from suit was not made an issue.

In the *Hart* and *Trust Company cases*, the State was a party-plaintiff and in each case the defendant raised questions as to whether or not the pleadings properly made the State a party-plaintiff. The right of the State to appear as a plaintiff does not carry with it a relinquishment of the State's immunity. The sovereign has the right to sue without being sued in all cases except those in which the Legislature has relinquished the State's immunity.

Nothing ruled by this Court in *Gunter v. Atlantic Coastline*, 200 U. S. 273, requires a reversal of the District Court judgment. When the prior case which controlled the decision in the *Gunter case*, *Humphrey v. Pegues*, 16 Wall, 244, arose, the pertinent statute in South Carolina was that adopted in 1868 as amended in 1870 (14 S.C. Stat. 65). Insofar as here material, this Act did four things:

(1) It gave to County Treasurers and Auditors certain duties with respect to State taxes, thereby constituting them in part State officers. (Page 279).[6]

(2) It provided that where any action is prosecuted against one of these officials for performing or attempting to perform any duty under the Act, the same shall be defended by the Attorney General "for and on behalf of the State" if the State be interested in the revenue in said action. (Page 286).[6]

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[6] Page references are to the decision of this Court in *Gunter v. Atlantic Coastline*.

(3) It made counties liable for counsel fees and any damages which might be awarded against officials for their efforts to enforce the provisions of that Act. (Page 286).[6]

(4) In 1870, the Act of 1868 was amended to provide that any judgment recovered against the collecting officers for recovery of money illegally collected as taxes should be paid by the County and the State to the extent of their respective interests. (Page 287).[6]

It was in this state of affairs that the *Pegues case* was instituted and the defense of the State officers made by the Attorney General.

In waiving sovereign immunity from suit, it is by no means unusual for the State or Federal Government to provide that the action shall be brought against one of its officers in his official capacity. Such was the case in the statute with which this Court was concerned in *Sunshine Anthracite Coal Company v. Atkins,* 310 U. S. 381. The Emergency Court of Appeals was concerned with a similar statute in *Safeway Stores v. Porter,* 154 F. 2d, 656, to refer but to those cases which Appellant has cited.

As this Court pointed out in *Chicago, Rock Island & Pacific v. Schendel,* 270 U. S. 611:

> "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties different may be, in legal effect, the same."

With these considerations in mind, it is abundantly clear that when this Court said at page 286 in the *Gunter case*:

> "We see no escape from the conclusion that the provision last quoted, where suit was brought concerning State taxes made a County Treasurer, who was the State Tax Collector, an agent for the state and empowered him 'for and on behalf of the State' to defend the suit and required him, in order fully to protect the interests of

the State, to be represented by the highest law officer of the State, the Attorney General.",

it was, in effect, saying that the State had consented to be sued through the persons of its County Treasurers, and that this consent was legislatively given by the Act of 1868 and the Amendment of 1870.

If we are correct in concluding that the *Gunter case*, supra, and its predecessor the *Pegues case*, supra, were authorized, as suits against the State with its consent, then certainly it affords Appellant little support for the proposition that this ancillary relief may be granted against the present State Revenue Commissioner, although the prior action be considered only as a suit against Wright, the individual wrongdoer, acting beyond his lawful authority.

d. Georgia did not, by inaction or acquiescence in the decision rendered in the *Wright case*, become estopped from raising the issue of sovereign immunity in the present case.

Appellant devotes a portion of his brief to showing that in 1908 a Governor who was not in office at the time the *Wright case* was instituted or decided by the District Court, in a message to the Legislature, spoke as though he regarded the *Wright* case as one to which the State of Georgia was a party. Appellant also apparently considers significant a resolution of the Georgia Legislature passed in 1913 referring to a then existing contract with John C. Hart to represent the interests of the State in suits for taxes against several railroad corporations. The John C. Hart referred to in this resolution is the same person who was Attorney General of Georgia during the period when the *Wright case* was making its way through the courts. He was no longer Attorney General when the resolution was passed. It is true that for a number of years prior to 1945 no effort was made by Georgia to tax the Georgia Railroad and Banking Company other than as provided in its charter. Appellee insists that inaction by the State, standing alone, will not create an estoppel. To para-

phrase the language of District Judge Russell in the District Court decision in this case, such a rule of estoppel would permit unauthorized officers to fritter away this essential attribute of sovereignty, notwithstanding the fact that they had no authority to waive it. Although the *Gunter case* makes reference to official inaction over a period of years, this inaction is given weight only as an administrative interpretation of the meaning of their statutes, which, in Appellee's view, granted consent to sue. There are no such statutes in Georgia which may be so administratively interpreted, and indeed we do not understand the Appellant to contend that inaction represented an administrative interpretation of the Attorney General's statutory authority.

e. The judgment in the *Wright case* did not and does not bar the State of Georgia because it had not consented to be bound thereby.

Since Georgia was not a formal party to the suit and since, as we have undertaken to show, it did not consent to be sued through its officer, it follows that the judgment rendered in the *Wright case* had no binding effect upon Georgia. This rests upon the fundamental principle of law that persons not parties or in privity with the parties or represented by parties are never precluded by a judgment. This principle is clearly recognized in *Gunter v. Atlantic Coast Line*, supra, and it was for that reason that it became necessary there to determine whether South Carolina had consented. It was likewise the controlling principle in *Carr v. United States*, supra, and in *Tindall v. Wesley*, 167 U. S. 204, and in *Hussey v. United States*, 222 U. S. 88. It was suggested in *United States v. Lee*, 106 U. S. 196, 217, that judgment against the agents of the Government would estop the Government, but this Court pointed out that this result would not follow. Indeed, we may say here, as the Court said in *Sunshine Anthracite Coal Co. v. Adkins*, supra:

> "The crucial point is whether or not in the earlier litigation the representative of the United States had authority

to represent its interest in a final adjudication of the issues in controversy."

To the same effect are *Sage v. United States*, 250 U. S. 33, *Bankers Pocahontas Coal Company v. Bennett*, 287 U. S. 308, and *Stone v. Interstate Natural Gas Company*, 103 F. 2d, 544, affirmed 308 U. S. 522.

f. Appellee, who is Georgia's present Revenue Commissioner, did not become estopped from raising the issue that a suit nominally against him is, in effect, a forbidden suit against the State.

Appellee concedes that, where legislation relinquishes sovereign immunity from suit by designating an officer of the sovereign and authorizing suit against him, judgment upon such a suit binds the State and his successors in office. *Sunshine Anthracite Coal Company v. Atkins*, supra. However, in the absence of a statutory consent to be sued, a judgment against such an officer is necessarily personal, and this personal judgment neither binds the sovereign nor his successors in office. *Stone v. Interstate Natural Gas Company*, (C.C.A. 5th), 103 F. 2d, 544, aff'd, 308 U. S. 522. Here again, the crucial point is whether the representative of the Government had authority to represent his sovereign in a final adjudication of the issue. The Comptroller-General had no such authority in the *Wright case* to represent Georgia in a final adjudication of its rights. Any action on the part of the Comptroller-General in that case purporting or attempting to waive Georgia's sovereign immunity was ultra vires. *Ford Motor Company v. Department of the Treasury*, supra, is precisely in point upon this question. It was pointed out in the opinion that respondents conceded that the actions of the administrative and executive officers of Indiana waived the State's immunity if it be within their power so to waive. No one but Wright was effected by a participation in the *Wright case*. This rule is clearly stated in *Stone v. Interstate Natural Gas Company*, supra, in which Stone, the State Commissioner of Franchise of Mississippi, forced the Gas Company to pay certain taxes. The Gas Company defended by contending that its immunity

from tax had been established by a former decree of the United States District Court enjoining other officers from collecting under a similar statute.

The language of Circuit Judge Sibley, who spoke for the Court in this case, is so appropriate to the case at Bar that we quote therefrom as follows:

> "We conclude also that the judgment in the three-judge case of Dec. 4, 1931, is no estoppel. It does not appear to be between the same parties. The Gas Company is plaintiff in both suits but Stone, the present defendant who is sought to be bound by the former judgment, was not a party to it. This suit against him is a personal suit and the judgment rendered is a personal judgment. Execution on it would run against him. The reference to him as Commissioner is *descriptio personae. Smietanka, Collector v. Indiana Steel Co.*, 257 U. S. 1, 42 S. Ct. 1, 66 L. ed. 99. The three-judge suit was against other individuals, who though officers were enjoined from what they were about to do on the ground that the law of their office did not justify them. The State of Mississippi for whom they tried to act was not a party, though her Attorney General was among those sued. She could not under the Eleventh Amendment, U.S. Const., have been sued. How officers who act for their government under an unconstitutional authority may be sued, and yet their governments not be bound by the judgment, is fully explained in *United States v. Lee*, 106 U.S. 196, 222, 1 S. Ct. 240, 27 L. ed. 171. See also *Sage v. United States*, 250 U. S. 33, 39 S. Ct. 415, 63 L. ed. 828; *Hussey v. Crane* (*United States*), 222 U. S. 88, 93, 32 S. Ct. 33, 56 L. ed. 106; *Carr v. United States*, 98 U. S. 433; 25 L. ed. 209; *Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754 50 L. ed. 960. Stone can now justify his collection of these taxes as fully as the State of Mississippi could do if she were now sued; *and as she is not bound by the former judgment against her officers, he is not.*" (Emphasis supplied).

From brief of counsel, we understand Appellant to take the position that, even though the suit against Wright be construed as against him in his individual capacity seeking to justify his action under an unconstitutional enactment, there is, nevertheless, sufficient privity between him and a subsequest officer so as to conclude him by the earlier judgment against Wright. The authorities on which counsel relies, however, do not support this position nor do they in anywise conflict with the holding in the *Stone case*, supra.

The first of these is *New Orleans v. Citizens Bank*, 167 U. S. 371, which, it is true, held that subsequent office-holders were bound by a judgment nominally against their predecessors, but, in speaking of the earlier case, this Court said, at the bottom of page 388:

> "The first contention, based upon the mere change in the person holding the particular office, is without merit. It is not denied that the Tax Collectors and Board of Assessors who stood in judgment in the suit when the decisions were rendered *were duly qualified and empowered to that end. And it is not gainsaid that the successors in office of those officers who are defenders here are also duly empowered.*" (emphasis supplied).

In *Tait v. Western Maryland Railway Co.*, 289 U.S. 620, the Court, while holding that judgment in a suit against the Commissioner of Internal Revenue is conclusive in a later suit upon the same issue against the United States and Collector of Internal Revenue said "since the Commissioner acted in the earlier suit in his official capacity as representative of the Government." (Page 626). In passing, however, the Court makes reference to the fact that judgment in a suit against the Collector is not conclusive upon a later suit against the United States or against the Commissioner for the reason that "in a suit for unlawful collection, the liability of a collector is not official, but prsonal." *Sage v. United States*, 250 U.S. 33; *Smietanka v. Indiana Steel Company*, 257 U.S. 1.

Sunshine Anthracite Coal Co. v. Atkins, 310 U. S. 381, may also be distinguished because the judment there held to be res judicata was one rendered upon petition for review under Section 6 (B) of the Bituminous Coal Act of 1937, 15 U.S.C.A. Sec. 836 (b), in which the United States had, in effect, given its consent to be sued. The crucial issue here is, we say, just as this Court said in the *Atkins case* (page 403), "whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."

Safeway Stores v. Porter, 154 F. 2d, 656, and *United States v. Willard Tablet Co.*, 141 F. 2d, 141, may be laid to one side for the same reason.

Appellant insists that to establish a rule contrary to that for which it contends would be against public policy, and would permit the State continually to relitigate the question of tax liability for a single year in successive trials. This is not so on Appellant's own argument in the case at Bar. As it has pointed out, an opportunity to question taxability is guaranteed to it by the Fourteenth Amendment. A successful defense on this issue in the manner provided would, of course, be conclusive upon the State. The infirmities which he points out in judgments obtained against officers as individual wrongdoers acting beyond their authority is inherent in the nature of the suits and in the nature of the sovereign immunity guaranteed by the Eleventh Amendment.

II.

The District Court's judgment of dismissal was proper, for the reason that Georgia provides plain, speedy and efficient remedies for determining Appellant's liability to tax.

a. Appellant may appeal from an adverse decision of the Revenue Commissioner upon the question of taxability.

An administrative procedure is provided for determining all questions of taxability and valuation which are initially for decision by the State Revenue Commissioner. (*Admini-*

stration of Taxing Laws Act, approved January 3, 1938, *Georgia Laws 1397-38* Ex. Sess., page 77; Georgia Code Ann. (Cum. Pkt. Pt.) Chap. 92-84). This procedure allows written protest by any taxpayer within thirty days after the making of any additional assessment by the Revenue Commissioner, and provides for notice to the taxpayer together with hearing and conference on such protest, and for determination of the issues thus made in that manner, which, final determinations are declared to be "subject to the right of appeal as declared in this Act." (Sections 30 and 31 of that Act. (App. 64), Georgia Code Ann. (Cum Pkt. Pt.), Sections 92-8432 and 92-8433).

From 1938 to 1943 the method of appeal provided by that Act was first to a Board of Tax Appeals created by the same Act, with right of full review by direct appeal to an appropriate superior court. Provisions for appeal to the superior court were incorporated in Section 45 of the Act in question (App. 65), Georgia Code Ann. (Cum. Pkt. Pt.), Sections 92-8446.

By Act adopted February 17, 1943, *Georgia Laws 1943,* page 205, the Board of Tax Appeals was abolished and provision made for review by direct appeal to the superior court in the manner provided by Code Section 92-8446. This review extended to "all matters, cases, claims and controversies arising in the administration of the revenue laws or in the exercise of the jurisdiction of the State Revenue Commissioner," except as otherwise in that Act provided. (App. 66). By the terms of the same 1943 amendment, an exception was made "with reference to reviewing *assessments* of the State Revenue Commissioner . . . for ad valorem taxation against" certain classes of taxpayers, which include this Appellant.

The Amendatory Act of 1943 then goes on to provide a method of arbitration of valuation, and to provide that the decision of the arbitrators shall be subject to appeal and judicial review identical with that provided for reviewable decisions of the Revenue Commissioner.

Appellant insists that Section 19 of the amended Act took

away the right to judicial review of the Administrator's decision, both on questions of taxability and valuation, and that it provided for submission to the arbitrators only the question of valuation, providing no review on the question of taxability. Appellee insists that Section 18 of the amended Act is limited by Section 19 only to the extent that the latter Section provides an alternative procedure, and that the *determination of taxability* is not one of the decisions of the Commissioner excluded from the general review provisions of Section 18 because it is not included within the meaning of the phrase "*assessment* for ad valorem taxation," as that expression is used in Section 19 of the amended Act. Appellee further insists that Section 19 of the amended Act should be read in the light of former provisions relating to assessment and arbitration, codified as Sections 92-6001 and 92-6002 (App. 59), which were declared by the 1943 amendment to the *Administration of Taxing Laws Act* to be of continued force, as modified. Clearly, these Sections relate only to a determination of value.

Similar provisions with reference to the arbitration of assessments for county taxes, Georgia Code 1933, Sections 92-6910, 92-6911 and 92-6913 (App. 60), have been held by the Supreme Court of Georgia not to include a determination of taxability. *Columbus Mutual Life Insurance Company v. Gullatt*, 189 Ga. 747, 754. In the course of this decision, that Court said, after reviewing certain measures adopted over a period of years for the purpose of allowing taxpayers to be heard on a question of valuation and taxability:

> "It will thus be seen that while there have been exceptions in one or two instances from the general rule of determining *valuation* by arbitration, in no instance has the Legislature departed from the policy of permitting contests of *taxability* to be determined by the superior courts, . . . We hold that the method of contesting the taxability of the property in question is by petition in equity in the superior court."

Thus, it seems clear that the expression "*assessment* for

ad valorem taxation," as used in Section 19 of the Act means only a determination of the value of the property, and that all other questions are left open for judicial review by appeal in the usual manner. Indeed, the terms of Section 45 of the Act of 1937, which were in no way expressly changed by the Act of 1943, are consistent only with this interpretation, as they make express provision for the venue in case of appeals by railroads on appealable decisions made by the Revenue Commissioner.

b. Appellant may pay taxes assessed on behalf of the State and sue the State, with its consent, for a refund.

Appellant does not deny that the remedy by payment and suit for refund is available with regard to tax assessed on behalf of the State. It is pointed out, however, that there is no provision of law for making refund of taxes paid to counties and other subordinate taxing units. Appellee does not question this latter position. The issue could be clearly presented with respect to the State by paying only the tax assessed in behalf of the State. Other remedies are available to test liability with regard to taxes assessed on behalf of counties and cities. There is no reason to assume, in the present state of the record, that Appellant would be forced to a multiplicity of remedies once the issue has been properly made in a suit to which the State is a party with its consent. We submit that the probability is that counties and municipalities will voluntarily defer action and abide by the event of a suit to which the State is properly a party, rather than rush precipitately into expensive and difficult litigation. Should this forecast prove erroneous, there will still remain time and opportunity to invoke the aid of an appropriate court having equitable jurisdiction. In any event, Appellant should, by all means, exhaust the administrative remedies of protest and hearing available to it before seeking judicial relief.

c. Appellant may arrest tax executions by affidavits of illegality.

The Act of February 28, 1874, *Georgia Laws 1874*, page

107, now codified as Sections 92-2602, 92-2603 and 92-2604, Georgia Code 1933 (App. 57), provided that the question of tax liability could be raised on an assessment against a railroad company for ad valorem tax by affidavit of illegality. The Supreme Court of Georgia held in *Goldsmith v. Georgia Railroad*, 62 Ga. 485, that the remedy thus provided was available only to those who made a timely tax return in accordance with that Act.

By Act approved August 28, 1931, known as the *Reorganization Act, Georgia Laws 1931*, page 7 (App. 63), now codified as Section 92-7301 of the Georgia Code of 1933, the right to employ affidavit of illegality is accorded to every taxpayer for the purpose of determining whether or not the tax is legally due, whether the right to such a remedy is allowed in the Act imposing the tax or not. The rights accorded by this Act were not conditioned upon making a timely tax return and, while the precise question has never been presented to or decided by the Supreme Court of Georgia, Appellant insists that its use is not so limited. This Act, or the portion of it here material, has never been expressly repealed. Certainly it was not expressly repealed by the *Tax Administration Act* of January 3, 1938, Georgia Laws Ex. Sess., 1937-38, page 77 (App. 64), and the only limitation which this Act imposed upon the use of this remedy is contained in Section 44 of that Act, wherein it is provided:

> "No trial court shall have jurisdiction of proceedings to question such assessments except as in this Act provided."

This limitation upon jurisdiction was removed by the Act of February 17, 1943, which expressly amended the Act of January 3, 1938, including in Section 18 the following:

> "Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Com-

missioner, of the right to resist enforcement of the same by affidavit of illegality."

Appellee insists that the effect of this Amendment of 1943 was to remove the bar to the exercise of jurisdiction imposed upon the courts by the earlier enactment and to make available the already existing remedy of affidavit of illegality.

Since the passage of the Act of 1943, the trial and appellate courts have exercised jurisdiction of issues made by the filing of affidavits of illegality. *Twentieth Century-Fox Film Corporation v. Phillips* (1948) 76 Ga. App. 825. And, indeed, appear to have entertained issues made by such affidavits of illegality between 1938 and 1943. *Department of Revenue v. Boykin*, 67 Ga. App. 289. *Department of Revenue v. Stewart*, 67 Ga. App. 281; and in the last named case, discussed the nature of the procedure to be followed in tax cases and pointed out the respects in which these procedures differed from procedures on common law executions, but made no suggestion that the Court might be without jurisdiction of the subject matter.

Appellant does not appear to take the position that this remedy was repealed with respect to taxes assessed on behalf of counties and municipalities. He contends, however, that the various taxing political subdivisions have an aggregate of 310 tax claims against the Georgia Railroad & Banking Company and, assuming that each would be separately levied by the sheriff states that 310 affidavits of illegality would be required. Under this statutory procedure, no affidavit of illegality lies until there has been a seizure of property thereunder.[7]

The proceeds of the sale of property by a sheriff may, of course, be applied to the settlement of all executions in his hands, as well as that under which seizure was made. *Newton v. Nunnally*, 4 Ga. 356. *Lowe v. Moore*. 8 Ga. 194.

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[7] Ga. Code 1933, Section 39-1003: "No affidavit of illegality shall be received by any Sheriff or other executing officer until a levy shall have been made."

The latter course is obviously the more practical and efficient from the point of view of the collecting officer. To assume that the taxing authorities would do otherwise imputes to them a course of action more calculated to harrass and annoy than efficiently to enforce. No facts in the record warrant such an inference.

d. Appellant may, if other remedies are inadequate, sue the State, with its consent, in the Superior Court of Fulton County.

This Court held in *Central of Georgia Railway Company v. Wright*, 207 U. S. 128, that due process of law required some opportunity to test the taxability of property, and if no such opportunity was afforded by statute then equity would afford relief. The Supreme Court of Georgia had, in effect, so held a number of years prior to the cited decision of this Court in the case of *Wright v. Southwestern Railroad Company*, 64 Ga. 783, and in *Goldsmith v. Georgia Railroad Company*, 62 Ga. 485. Again in 1906, in *City of Atlanta v. Jacobs*, 125 Ga. 523, that Court reiterated this rule. In 1918 it was codified in the following language:

> "Section 92-6104. If the delinquent under section 92-6102 disputes the taxability of such property he may raise the question by petition in equity in the Superior Court of Fulton County, and if such delinquent is dead, his personal representative or representatives shall have the same right."

Appellant contends that it is within the meaning of the term "delinquent" as used in that Section which applied to those persons required to make property tax returns to the then Comptroller-General, now State Revenue Commissioner, and who failed to make such returns within the time required by the statute. Appellant insists that this statute has been repealed by the subsequent enactment of the *Administration of the Taxing Laws Act*, supra, which purported to limit the jurisdiction of trial courts.

Appellee contends upon this point that the rule was not exclusively of legislative origin, and that the subsequent

legislation mentioned did not accompany its repeal. Indeed, if, as Appellant insists, there is no other adequate remedy for testing the issue of taxability, then the constitutional reasons which gave rise, in advance of codification, to the statute would continue to make it available as a remedy.

III.

The District Court did not err in failing to grant summary judgment for Appellant as prayed.

a. The legislature was without constitutional authority to bind Georgia by contract perpetually alienating a portion of the sovereignty of the State.

Legislative authority, or the want of such authority, at the time Georgia Railroad & Banking Company was chartered is to be determined from Georgia's Constitution of 1798. To fully appreciate the meaning of certain of its language, certain incidents in Georgia history should be recalled.

On January 7, 1795, the Legislature enacted the most celebrated statute in Georgia history, the *"Yazoo Act." Watkins Digest,* 387. Under the misleading title, "An Act to supplement an Act for appropriating a part of the unlocated territory for the payment of the late State troops and for other purposes therein mentioned; declaring the right of this State to the unappropriated territory thereof, for the protection of the frontiers, and for other purposes.", most of what is now Alabama and Mississippi was sold to four land companies for the paltry sum of $500,000.00. When this action became generally known, public wrath and indignation, in large part directed at a careless and inattentive Legislature, rose to high pitch. On February 13, 1769, the so-called *Rescinding Act* was adopted. *Princes' Digest,* 515. In seeking to rescind and renounce the *Yazoo Act* as a fraud and as constitutionally void, the *Rescinding Act* stated in its preamble certain constitutional principles, including the following on the nature and limitation of legislative power:

> ". . . The free citizens of the State or, in other words, the community thereof, are essentially the source of the

> sovereignty of the State, and no individual or body of men can be entitled to or vested with any authority which is not expressly derived from that source, and the exercise or assumption of powers not so derived become themselves oppression and usurpation."

The sale was then branded as "operating as a dereliction of jurisdictional rights, and a virtual dismemberment of the State."

McElreath, in his treatise on the Constitution of Georgia, page 92, Section 75 (1912), states of the constitutional principles announced in the *Rescinding Act*, that:

> "In this reasoning the Legislature was grasping at a constitutional principle inhering in natural right not fully grasped and expressed in the organic law of the State until it was embodied in the Constitution of 1877; that 'the right of taxation is a sovereign right, inalienable, indispensable'; is the life of the State, and rightfully belongs to the people in Republican governments, and neither the General Assembly nor any or all Departments of the Government established by this Constitution shall ever have the authority to irrevocably give, grant, limit, or restrain this right . . ."

Constitutional delegates were elected at the general election in 1797. The Constitutional convention assembled in May, 1798, and from their hands came the document which became the Constitution of 1798.

Thus it was the influence of the Yazoo Act which caused the amendment of May 16, 1795 to the Constitution of 1789, which is unusual among State Constitutions of that day, "All powers not delegated by the Constitution as amended are retained by the people." Constitution of Georgia, 1789, Article VIII.

Not only did the Constitution of 1798 limit the power of the legislature to those fields described, but, in Article I, Sec. 22 and 23 (App. 52), Appellee submits that alienation of sovereignty was expressly prohibited. It coupled jurisdictional rights with territorial rights, and declared of both that they

were held by the free citizens of the State in sovereignty, inalienable but by their consent, expressly declaring of the territorial rights that to such rights as the power of contract or sale by Legislature shall not extend.

Prior to 1833, this limitation on legislative power was judicially recognized. In *State v. Dews*, R. M. Charlton, 397, a Superior Court of Georgia disposed of the claims made by a public official to the effect that he had a property right in a public office, in the following language:

> "As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*, which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting that they can have a private property in that sovereignty."

Appellee submits that the contractual alienation of the sovereign right to tax was also incomprehensible to the Constitution delegates of 1798, and only this inability to comprehend and foresee an attempted alienation of the taxing power prevented an even more express injunction against such legislative action.

The breadth and scope of the opinion in the *Dews case*, supra, is indicated by the following language which appears at page 414:

> "Indeed, with how much more force may it not be objected to such a proposition, that it is not adequate to the Legislature to grant to an officer privileges which impair or interfere with the powers necessarily and inseparable appertaining to the sovereign legislative power of the State, since it would violate the fundamental compact, the compact of the Constitution?"

This question arose again in the case of *Hamrick v. Rouse*, 17 Ga. 56. We quote from the opinion of Judge Starnes on page 60:

> ". . . it is very certain that no Legislature has the right

to bind all subsequent Legislatures, all posterity, as to any matter of mere political arrangement or expediency. The good faith of the State, or its people, under some circumstances, in a moral point of view, might become very decidedly pledged by the Legislature to such political arrangement; but still, as a matter of contract, the Legislature could not bind posterity upon a subject of mere political expediency."

Again in the case of *Bailey v. The State*, 20 Ga. 742, we quote from the opinion of Judge Benning on page 744:

"No legislature has a power to curtail or to contract the power of a subsequent legislature."

The next case involving this question was that of *Daly v. Harris*, 33 Ga. Supp. 38. We quote from pages 50 and 51:

"Again, it is true of all governments invested with legislative power for the common weal, that no Legislature can, by contract, divest either itself or its successors of any power necessary to the well-being of the State. *The Presbyterian Church v. The Mayor and Council of New York*, 5 Cowen, 538; *Gosler v. Georgetown*, 6 Wheaton, 593, *Ohio Life Insurance and Trust Company v. Debolt*, 16 Howard, 431; (opinions of Chief Justice Taney and Mr. Justice Campbell). *Hamrick v. Rouse*, 17 Ga. 59, 60; *Bailey v. The State*, 20 ibid. 744. Governments have, in themselves, no rights to be secured or interests to be protected. They are mere agencies established for the security of rights and the promotion of interests appertaining to the founders, who, by common consent, have become the governed. To this end, they have been invested with certain necessary powers, the exercise of which devolves upon different individuals, who, in the course of time, come successively into the government. If the depository of those powers for the passing hour, may alien any one of them, so as to deny itself and its successor the exercise of it, all of the others may be so aliened, and the result would follow, that an agency established by society for certain specified ends, may, in

its discretion, defeat those very ends, which would be contrary to first principles, and subversive of all government."

In *State v. Georgia Railroad & Banking Company*, 54 Ga. 424, Judge McCay refers to these principles and to the decision of this Court in *Ohio Life Insurance and Trust Company v. Debolt*, 16 How. 431, in which Mr. Justice Taney clearly stated that the power of the Legislature to limit the powers of future Legislatures "must depend upon the Constitution of the State and the extent of the power therein granted to the legislative body." After clearly raising this question, Judge McCay does not decide it, but instead expressed the view that he was bound by decisions of this Court, no one of which is concerned with the nature and limitation of powers granted by the Georgia Constitution of 1798.

The personal views of Judge Bleckley, who succeeded Judge McCay within a few months after this decision, expressed in *Atlantic & Gulf Railroad Company v. State*, 55 Ga. 321, decided at the July Term, 1875, after the decision in the *Georgia Railroad case* at the January Term of that year, were:

> "Whatever power legislative bodies may have in other states of the union to part with or limit the essential prerogatives of sovereignty, no such power exists, or ever has existed, in the general assembly of Georgia. Consequently, all exemptions from the common burdens of taxation hitherto granted by the statute to corporations or others, ought to be construed as privileges only, and as revocable at the will of the legislature."

No constitutional attack was made upon the Act of 1833 in *State v. Georgia Railroad & Banking Company*, 54 Ga. 424, as is clearly shown by the record in that case. (R. 134-160.)

Upon this point, Judge McCay's remarks are therefore obiter dicta.

The reservation to the people of powers not expressly

delegated was recognized by the Supreme Court of Georgia as late as March, 1947, in *Thompson v. Talmadge*, 201 Ga. 867, which refers with approval to *State v. Dews*, supra. At page 879, Chief Justice Duckworth said, in another connection:

> "In this State all power and sovereignty repose in the people. The Departments of the State Government have and can exercise only such power as the people have conferred upon them by the Constitution."

The language of Article 4, Section 1, Paragraph 1, of the Constitution of 1877 was but a more explicit enunciation of the constitutional principle already embodied in Sections 23 and 24 of the Constitution of 1798.

> "Taxation, a sovereign right. The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit or restrain this right; and all laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

b. If here was was a valid contract granting perpetual limitation upon appellant's tax liability, it was rendered unconstitutional and void by the adoption of he 14th Amendment to the Constitution of the United States.

Section 27 of Art. I of the Georgia Constitution of 1868 provided for ad valorem taxation upon property as a major means of revenue. It further provided that this taxation should be

uniform on all species of property taxed. The Georgia Constitution of 1868 was adopted at an election held on April 30th of that year. The Legislature was convened on the following 4th of July, and on July 21st it ratified the 14th Amendment to the Federal Constitution. On that same day the 14th Amendment became effective. The subsequent Georgia Constitution of 1877 likewise contained, in Article VII, Section 2, Paragraph 1, provision with respect to the taxation of property as follows:

> "All taxation shall be uniform upon the same class of subjects, and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws . . ."

The imposition of a general property tax being required by the State Constitution, appellee insists that under the mandate of the 14th Amendment it must be applied uniformly to those railroad corporations which have charter tax exemption, as well as to those which have no such exemption. Equal protection of the laws may be as well denied by the grant of special privileges to a select few as by the imposition of exceptional burdens upon arbitrarily selected groups. This Court in *Hartford Steam Boiler Insurance Company vs. Harrison*, 301 U. S. 459, has said upon the question of classification and discrimination:

> "The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from *Louisville Gas & Electric Company vs. Coleman, Auditor*, 277 U. S. 32, 37, 38:
>
> 'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U.S. 321, 337; *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara*

vs. Southern Pac. R. Co., 18 F. 385, 388, 399; *The Railroad Tax Cases*, 13 F. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. vs. Virginia*, 253 U. S. 412, 415; *Airway Corp. vs. Day*, 266 U. S. 71, 85; *Schlesinger vs. Wisconsin*, 270 U. S. 230, 240. That is to say, mere difference is not enough; the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis*, 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin vs. District of Columbia*, 205 U. S. 135, 139; *Bell's Cap R. R. Co. vs. Pennsylvania*, 134 U. S. 232, 237.

"Despite the broad range of the state's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Company vs. Baldwin*, 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense."

c. If a valid contract of tax limitation existed, Appellant is not now entitled to summary judgment thereon for the reason that it has failed to comply with its obligations and its contract rights have been forfeited.

In order to be entitled to summary judgment, it is incum-

bent upon Appellant to show that it has fully complied with the contract which it seeks to enforce against the State.

The title of the Act of 1833 provides, in part, as follows:

> "An Act to incorporate the Georgia Railroad Company, with powers to construct a Rail or Turnpike Road from the City of Augusta, with branches extending to the Towns of Eatonton, Madison in Morgan County, and Athens, to be carried beyond those places, at the discretion of said Company, . . ."

The purposes of incorporation as stated in the Act are as follows:

> ". . . completion of a railroad communication between the city of Augusta and some point in the interior of the State, to be agreed upon by the stockholders, which road shall be called the Union Railroad; and the same being completed, the Company shall have power to construct three branch railroads, beginning at the point agreed upon as the termination of the Union Road, or such point for the middle road as the stockholders may select; one running to Athens—one to Eatonton, and the other to Madison, in Morgan County; which branches shall be erected simultaneously: Provided, the amount of stock subscribed will warrant the completion of all at the same time, and if the stock subscribed will not warrant the completion of all of said branches at one and the same time, then that branch shall be first completed which the stockholders may by vote designate. The Company shall have the further power to continue the Athens branch towards any point which may be agreed upon, on the Tenessee River—all of which shall be done at such time and in such manner as the stockholders may direct."

It is Appellee's contention that it is a part of Appellant's case to show that it has complied with the terms of the statute.

Section 15 of the Act as to the alleged exemption provides:

> ". . . The stock of said Company and its branches shall

be exempt from taxation for and during the term of 7 years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investment."

Neither of the roads from Union Point to Eatonton nor from Athens to the vicinity of Chattanooga, as required by the charter, has been completed.

Upon this point the Supreme Court of Georgia said, in *Ordinary v. Central Railroad and Banking Company*, 40 Ga. 647, 652:

> "It is insisted that this is a contract between the State and the company, which forever exempts the company from a higher tax than one-half of one per cent. on its net income, and that they are entitled to this perpetual exemption from taxation, no matter what may be the exigencies of the State or the burdens of taxation upon her people. If this be so, it is certainly but just to hold the company to such part of the contract as is favorable to the public."

The same Court, in *Singleton v. Southwestern Railroad Company*, 70 Ga. 464, said:

> "A corporation has only the power conferred upon it by charter. Its grants of powers and exemptions are always to be strictly construed, and *its obligations are to be strictly performed*, whether they may be due to the state or to individuals." (Emphasis supplied)

The law of the State upon this question is controlling. *Bacon v. Texas*, 163 U. S. 207.

IV.

In no event should Appellant have summary judgment establishing exemption to its branch from Madison to Atlanta because that branch was never included within the limitation provisions.

Even should Appellant's claim to tax exemption under the alleged contract between the State of Georgia and Appellant be established, that alleged contract made no provision for the construction of a railroad from Madison, Georgia, to Atlanta. The legislation providing for the construction of this Branch was enacted in 1837 by the General Assembly. *Georgia Laws 1837*, page 216 (App. 56). That Act provided that Appellant should have the right and was "authorized and empowered" to continue its railroad from Madison along the line now known as the Madison-Atlanta Branch. The Act provided that,

> ". . . for that purpose the said Georgia Railroad & Banking Company, shall have all the powers and privileges, rights and immunities in the construction of said Branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several Acts heretofore passed, and now of force, constituting the Charter of the Georgia Railroad and Banking Company as fully as if the said continuation had been originally a part of the Georgia Railroad; and the said Acts shall extend to and regulate the construction of said extended road hereby authorized to be constructed, in the same manner, and to the same extent, and for the same purpose and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison,"

It must be noted that the "powers and privileges, rights and immunities" provided for in the Act are allowed to Appellant only "in the construction of said Branch." Appellee does not question the fact that Appellant did enjoy the exemption granted by the previous Acts of the Legislature in its construction of the line from Madison to Atlanta; however, it is earnestly insisted that when the construction was concluded the exemption was likewise terminated.

No other construction of the Act is possible under the rule which requires that a surrender of the power to tax must be shown by clear and unambiguous language which will admit

of no reasonable construction consistent with the reservation of the power. *Delaware Railroad Tax Case*, 18 Wall. 207. *West Wisconsin Railway Company vs. The County of Trempealeau*, 93 U. S. 595. See also the language in *Vicksburg, S & P Rail Company vs. Dennis*, 116 U. S. 665, wherein the Court said:

> "A state is never to be presumed to have relinquished its power of taxation unless its intention so to do is clearly expressed in language to that effect."

Far from indicating a legislative intent to exempt the Madison-Atlanta branch from taxation after its construction, the contrary intent is clearly expressed and, there being no question as to the completion of the branch, it is now taxable.

CONCLUSION

It is respectfully submitted that the judgment in the District Court dismissing Appellant's complaint should be affirmed and that in no event should summary judgment for the Appellant be directed.

Respectfully submitted,

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APPENDIX

Georgia Constitutioinal provisions and Statutes cited.

SECTIONS XXII, XXIII AND XXIV OF ARTICLE I OF THE GEORGIA CONSTITUTION OF 1798

(The italicised portion being material to the consideration of the questions involved in this case.)

"Sec. XXII. The general assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, *which shall not be repugnant to this constitution.*" (Italics supplied.)

"Sec. XXIII. They shall have power to alter the boundaries of the present counties, and to lay off new ones, as well out of the counties already laid off, as out of other territory belonging to the State; but the property of the soil, in a free government, being one of the essential rights of a free people, it is necessary, in order to avoid disputes, that the limits of this State should be ascertained with precision and exactness; *and this convention composed of the immediate representatives of the people, chosen by them to assert their rights, and to revise the powers given by them to the government, and from whose will all ruling authority of right flows,* doth assert and declare the boundaries of this State to be as follows: That is to say, the limits, boundaries, jurisdictions, and authority of the State of Georgia, do, and did, and of right ought to extend from the sea, or the mouth of the river Savannah, along the northern branch or stream thereof, to the fork or confluence of the rivers now called Tugalo and Keowee, and from thence along the most northern branch or stream of the said Tugalo, till it intersects the northern boundary line of South Carolina. If the said branch or stream of Tugalo extends so far north, reserving all the islands in the said rivers Savannah and Tugalo to Georgia; but if the head spring or source of any branch or stream of the said river Tugalo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi to be drawn from the head spring or course of the said branch or

stream of Tugalo river, which extends to the highest northern latitude; thence down the middle of the said river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; south by a line drawn due east from the termination of the line last mentioned, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Chattahoochee; hence along the middle thereof to its junction with Flint river; thence straight to the head of St. Mary's river, and thence along the middle of St. Mary's river to the Atlantic Ocean; and from thence to the mouth or inlet of Savannah river, the place of beginning. Including and comprehending all the lands and waters within the said limits, boundaries, and *jurisdictional rights,* and also all the islands within twenty leagues of the sea coast. *And this convention doth further declare and assert, that all the territory without the present temporary line and within the limits aforesaid, is now of right the property of the free citizens of this State, and held by them in sovereignty, inalienable but by their consent*: Provided nevertheless, that nothing herein contained shall be construed so as to prevent a sale to, or contract with the United States, by the legislature of this State, of and for all or any part of the western territory of this State, laying westward of the river Chattahoochee, on such terms as may be beneficial to both parties; and may procure an extension of settlement, and an extinguishment of Indian claims in and to the vacant territory of this State, to the east and north of the said Chattahoochee, *to which territory such power of contract or sale, by the legislature, shall not extend;* And provided also, the legislature may give its consent to the establishment of one or more governments westward thereof; *but monopolies of land by individuals being contrary to the spirit of our free government,* no sale of territory of this State, or any part thereof, shall take place to individuals or private companies, unless a county or counties shall have been first laid off, including such territory, and the Indian rights shall have been extinguished thereto." (Italics supplied.)

Sec. XXIV. *The foregoing section of this article having declared the common rights of the fee citizens of this State*

in and to all the territory without the present temporary boundary line, and within the limits of this State thereby defined, by which the contemplated purchases of certain companies of a considerable portion thereof are become constitutionally void; and justice and good faith require that the State should not detain a consideration for a contract which has failed; the legislature, at their next session, shall make provision by law for returning to any person or persons who has or have bona fide deposited moneys for such purchases in the treasury of this State; Provided that the same shall not have been drawn therefrom in terms of the act passed the 13th day of Feb. 1796, commonly called the rescinding act, or the appropriation laws of the years 1796 and 1797; nor shall the moneys paid for such purchases ever be deemed a part of the funds of this State, or be liable to appropriation as such; but until such moneys be drawn from the treasury, they shall be considered altogether at the risk of the persons who have deposited the same. No money shall be drawn out of the treasury, or from the public funds of this State, except by appropriation made by law, and a regular statement and account of the receipts and expenditures of all public moneys shall be published from time to time. *No vote, resolution, law, or order shall pass the general assembly, granting a donation or gratuity in favor of any person whatever, but by the concurrence of two-thirds of the general assembly.*" (Italics supplied.)

Art. 1, Section 27 of Georgia Constitution of 1868:

"The power of taxation over the whole State shall be exercised by the general assembly only to raise revenue for the support of government, to pay the public debt, to provide a general school-fund, for common defense and for public improvement; and taxation on property shall be ad valorem only, and uniform on all species of property taxed."

ARTICLE IV, SECTION I, PARAGRAPH I OF THE GEORGIA CONSTITUTION OF 1877

"The right of taxation is a sovereign right—inalienable, indestructible—is the life of the State, and rightfully belongs to the people in all Republican governments, and neither the General Assembly, nor any, nor all other departments of the Government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts, whatsoever, by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby, declared to be null and void, for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever, by the General Assembly."

Section 15 of Act of Georgia Legislature, December 21, 1833, incorporating Georgia Railroad Company:

Sec. 15. The exclusive right to make, keep up and use the Railroads and transportations, authorized by this Act, shall be for and during the term of thirty-six years, to be computed from the time when the said Road from Augusta to either of the points hereinbefore designated, shall be completed for transportation: *Provided*, That the subscription of stock or shares of said Company to the amount of at least five thousand shares as aforesaid, be filled up within six months from the passing of this Act, and the work from, or between Augusta, and either of the places hereinbefore first mentioned, be commenced within two years and be completed within six years after the five thousand shares shall be subscribed. And after said term of thirty-six years shall have elapsed, though the Legislature may authorize the construction of other Railroads, for the trade and intercourse contemplated herein: *Nevertheless*, The Georgia Railroad Company shall remain and be incorporate, and vested with all the estate, powers and privileges as to their own works herein granted and secured, except the exclusive right to make, keep up, and use Railroads over and through such parts of the country, that shall so have

expired by the foregoing limitations; but the Legislature may renew and extend that exclusive right, upon such terms as may be prescribed by law, and be accepted by the said incorporated Company. The stock of the said Company and its Branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said Railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments.

Act approved December 25, 1837, amending Charter of the Georgia Railroad & Banking Company:

WHEREAS, By an Act entitled "An Act to authorize the construction of a Railroad communication from the Tennessee line, near the Tennessee river, to the point on the southeastern bank of the Chattahoochee river, mostly eligible for running branch roads, thence to Athens, Madison, Milledgeville, Forsyth and Columbus, and to appropriate monies therefor," encouragement is held out in the tenth section of said Act, for the construction of branch Railroads from the terminus of said State Railroad, on the Chattahoochee river, to the several towns of Athens Madison, Milledgeville, Forsyth and Columbus:

AD WHEREAS, in pursuance of the views of said Act, the Monroe Railroad Company, and the Chattahoochee Railroad Companies have obtained the privilege, by acts of the Legislature, to connect their roads with said State Railroad;

Now, for the purpose of extending a like privilege to the Georgia Railroad and Banking Company, to continue their Road from the town of Madison, to pass through or near the town of Covington, to the said State Railroad, on the Chattahoochee river:

SEC. 1. *Be it enacted, etc.,* That the said Georgia Railroad and Banking Company shall have the right, and they are hereby authorized and empowered to continue their Railroad from the town of Madison, in Morgan County, to pass through or near Covington, in the County of Newton, to connect with and join the Railroad, about to be constructed by the State,

from the Tennessee line, near the Tennessee river, to the south-east bank of the Chattahoochee river, as contemplated by the Act recited in the foregoing preamble, and for that purpose the said Georgia Railroad and Banking Company shall have all the powers and privileges, rights and immunities in the construction of said branch from Madison, as aforesaid, to the said State Railroad, as are contained in the several acts heretofore passed, and now of force, constituting the charter of the Georgia Railroad and Banking Company, as fully as if the said continuation had been originally a part of the Georgia Railroad, and the said acts shall extend to and regulate the construction of said extended road, hereby authorized to be constructed, in the same manner, and to the same extent, and for the same purposes and uses, as the same have been used and applied to the Georgia Railroad and its branch from the city of Augusta to the said town of Madison.

Georgia Code, 1933,
Section 39-1003.

"Affidavit of illegality not to be received until after levy.—No affidavit of illegality shall be received by any sheriff, or other executing officer, until a levy shall have been made. (Act 1838, Cobb, 514.)"

Act of February 28, 1874, as amended, codified as Sections 92-2602, 92-2603, 92-2604, Georgia Code of 1933:

Section 92-2602.

"Presidents to make returns.—The presidents of all the railroad companies, including street railroads, dummy railroads, and electric railroads in this State shall be required to return on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State; and said return shall be made under the same regulations provided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller General: Provided, that the said railroads

shall be taxable for city purposes as other property is taxed for city purposes, and any law making railroad companies taxable by counties will be applicable to street railroad companies of every character. (Acts 1874, p. 107; 1889, p. 36.)

Section 92-2603.

"Presidents to pay taxes assessed.—Said presidents shall pay to the Comptroller General the taxes assessed upon the property of said railroad companies; and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same in the manner provided by law for the enforcement of taxes against other incorporated companies. (Acts 1874, p. 107.)

Section 92-2604.

"Illegality to resist tax; venue.—If any railroad company affected by the preceeding sections desires to resist the collection of the tax therein provided for, said company through its proper officer may, after making the return required in section 92-2602, and after paying the tax levied on such corporation and continuing to pay the same while the question of its liability herein is undermined, resist the collection of the tax above provided for, by filing an affidavit of illegality to the execution or other process issued by the Comptroller General, stating fully and distinctly the grounds of resistance, which shall be returnable to the superior court of Fulton county, to be there determined as other illegalities; the same to have precedence of all cases in said court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality, in which case the Comptroller General shall be represented by the Attorney General of the State. If the grounds of such illegality are not sustained, the Comptroller General shall, after crediting the process aforesaid with the amount paid, proceed to collect the residue due under the provisions aforesaid; and if, at any time during the pendency of any litigation herein provided for, the said corporation fail to pay the tax required to be paid as a condition of hearing, said illegality shall be dis-

missed, and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax execution issued by the Comptroller General. (Acts 1874, p. 107; 1931, pp. 7, 38.)"

Georgia Code, 1933,
Section 92-6001.

"Assessment to correct returns.—The Comptroller General shall carefully scrutinize the returns made to him, and if in his judgment the property embraced therein is returned below its value, or the return is false in any particular, or in any wise contrary to law, he shall within 60 days thereafter correct the same and assess the value, from any information he can obtain. (Acts 1877, p. 126; 1905, p. 68.)"

Georgia Code, 1933,
Section 92-6002.

"Arbitration of assessmnts to correct returns.—In all cases of assessment or correction of returns, as provided in section 92-6001, the officer or person making such returns shall receive notice and, if dissatisfied with the assessment or correction of returns, shall have the privilege, within 20 days after such notice, to refer the question of the true value or amount to arbitrators—one chosen by himself and one by the Comptroller General—who, in case of disagreement, may choose an umpire. If the two arbitrators, disagreeing, fail to select an umpire within 30 days after receiving notice of their appointment, the Governor shall appoint two arbitrators who, with the arbitrator selected by the officer or person making the returns, shall determine the question as to the amount or value. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made within 30 days from the appointment of the umpire or, in case no umpire is chosen, within 30 days from the appointment of arbitrators by the Governor; and their award shall be final. (Acts 1877, p. 126; 1878-9, p. 166; 1905, p. 68.)"

Georgia Code, 1933,
Section 92-6801.

"Taxes how assessed and collected.—In all cases where taxes are authorized for any purpose and no adequate provision is made in the law authorizing the same or in the general law for giving the taxpayer notice and opportunity to be heard as to the valuation and taxability of his property, the method of assessing and collecting said taxes shall be as set forth in this Chapter. (Acts 1910, p. 22.)"

Georgia Code, 1933,
Section 92-6802.

"Assessment by the Comptroller General; arbitration.—Where the property subject to said tax is such as is returnable to the Comptroller General, he shall assess the same at the valuation fixed in the annual returns, if said returns are satisfactory to him; if not, he shall within 60 days after receiving said returns make an assessment of the property from the best information he can procure, and notify in writing the officer or person making such returns, who shall have the privilege within 20 days after receiving such notice to refer the question of true value to arbitrators, one to be chosen by himself, and one to be chosen by the Comptroller General, with power in the two so chosen to choose an umpire in case of disagreement; and their award shall be final. (Acts 1910, pp. 22, 23.)"

Georgia Code, 1933,
Section 92-6104.

"Issue of taxability, where tried.—If the delinquent under section 92-6102 disputes the taxability of such property, he may raise the question by petition in equity in the superior court of Fulton County, and if such delinquent is dead, his personal representative or representatives shall have the same right. (Acts 1918, p. 234.)"

Georgia Code, 1933,
Section 92-6910.

"Chairman and secretary of board; employment of agent to seek out unreturned property.—The county board of tax assessors shall elect one of their number as chairman for such term as they shall fix. The board shall have authority to

employ a competent person to serve as secretary. He shall keep a record of the proceedings of the board, and shall receive for his services in this capacity such compensation as may be fixed by the board of county commissioners or other authority in charge of the financial affairs of the county but not less than $3 per day while actually attending sessions of the board; the same to be paid out of the county treasury in the same manner in which other county payments are made. The board shall have authority to employ agents to seek out all unreturned taxable stocks and bonds together with all other classes of unreturned taxable property in the county and bring it to the attention of said board. Said agent shall be allowed for such services a commission of not more than 10 per cent. of the amount of tax collected by the county for county and school purposes from such unreturned property so discovered and placed on the digest by the efforts of said agents. The commission allowed said agents shall be paid from the county treasury out of the amounts so placed on the books by the said agents and when collected by the county as a part of the expense of said board. (Acts 1937, pp. 517, 518.)"

Georgia Code, 1933,
Section 92-6911.

"Meeting of board; duties.—The board of county tax assessors in each county may meet at any time to receive and inspect the tax returns to be laid before them by the tax receiver as hereinfore provided. The board shall examine all the returns of both real and personal property of each taxpayer, and if in the opinion of the board any taxpayer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the board shall correct such returns and shall assess and fix the just and fair valuation to be placed on the property and shall make a note thereof and attach the same to the returns. It shall be the duty of the board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual taxpayers are fairly and justly equalized so that each taxpayer shall pay as near as may be only his

proportionate share of taxes. When any such corrections, changes or equalizations shall have been made by the board, the board shall, within a period of five days, give notice to any taxpayer of any changes made in his returns, either personally or by leaving same at his residence or place of business or by sending said notice through the United States mails to his last known place of address. In all cases where an assessment is made or return is changed or altered by authority of the county tax assessors, as herein provided, and notice is not given personally to the taxpayer as herein provided, the notice of such assessment or of such change shall be posted in front of the courthouse door, which posted notice shall contain the name of the owner liable to taxation, if known, and a brief description of the property, if owner is unknown, together with a statement that the assessment has been made, or the return changed or altered as the case may be, and need not contain other information. It shall be the duty of the ordinary of the county to make a certificate as to the posting of such notice, which certificate signed by the ordinary shall be recorded by the board of tax assessors in a book kept for that purpose. A certified copy of such certificate of the ordinary duly authenticated by the secretary of the board, shall constitute prima facie evidence of the posting of such notice as required by law. (Acts 1937, pp. 517, 519.)"

Georgia Code, 1933,
Section 92-6913.

"Duty to ascertain what property is subject to taxation.—It shall be the duty of the board to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper returns for taxation. The board shall make such investigation as may be necessary to determine the value of any property upon which for any reason all taxes due to the State or to the county have not been paid in full as required by law, and, in all cases where the full amount of taxes due the State or county have not been paid, it shall be the duty of the tax assessors to assess against the owner, if known, and the property, if the owner

is not known, the full amount of taxes which have accrued and which may not have been paid at any time within the statute of limitations. In all cases where taxes are assessed against the owner of property, the tax assessors may proceed to assess the same against the owner thereof according to the best information obtainable and such assessment, if otherwise lawful, shall constitute a valid lien against the property so assessed. In all cases where unreturned property is assessed by the board after the time provided by law for making tax returns has expired, the board shall add to the amount of State and county taxes due a penalty of 10 per cent., except that if the principal sum of the tax so assessed is less than $10 in amount, the board shall add to the amount of State and county taxes a penalty of $1. The penalty therein provided shall be collected by the county tax collector or the county tax commissioner and in all cases paid into the county treasury and remain the property of the county. (Acts 1913, pp. 123, 128; 1937, pp. 517, 521.)"

Section 80 of Act approved August 28, 1931, known as Reorganization Act, Georgia Laws 1931, page 7, codified as Section 92-7301, Georgia Code of 1933.

"Levy of tax executions by State Revenue Commission. Illegality.—In the case of any tax due the State or any tax assessed by the State Revenue Commission, whether so specifically provided in the law levying the tax or not, the Commission is empowered to issue an execution bearing teste in the name of the chairman of the Commission and directed to all and singular the sheriffs of this State, commanding them to levy upon the goods and chattels, lands, and tenements of the taxpayer, which execution it shall be the duty of any sheriff to execute as in case of writs of execution from the superior courts. Whenever any such writ of execution has issued, the taxpayer, in order to determine whether the tax is legally due, may tender to the levying officer his affidavit of illegality thereto; and upon the payment of the tax if required as a condition precedent by the law levying the tax, and upon his giving a good and solvent bond for the eventual condemnation money in cases where said law does not require the payment

of the tax as a condition precedent, the levying officer shall return the same to the superior court of the taxpayer's residence, except in case the law provides otherwise, and the same shall be summarily heard and determined by the court. (Acts 1931, pp. 7, 33.)"

Sections 29, 30, 31 and 45 of Act of January 3, 1938, Georgia Laws, Ex. Sess. 1937-38, page 77.

"SECTION 29. Notice of Assessment. In all cases in which the Commissioner is required by law to provide an opportunity for protest the license fee shall become final if no written protest is filed by the taxpayer with the said Commissioner within thirty (30) days of the date of such notice. For the purpose of this section said notice shall be deemed to have been given if written notice is deposited in the mails registered and addressed to the txpayer at the last known address of such taxpayer. If no such record is on file said notice shall be by personal service.

SECTION 30. Protests. Any taxpayer may contest any additional assessment or license made or determined by the Commissioner by filing with the said Commissioner a written protest at any time within thirty (30) days from the date of notice of the assessment or license. All protests shall be prepared in such form and contain such informtion as the Commissioner shall reasonably require and shall include in any case a summary statement of the grounds upon which the taxpayer relies and his reasons for disputing the finding of the Commissioner. In the event the taxpayer desires a conference or hearing, such fact must be set out in the protest. The Commissioner shall grant such a conference before his officers or agents as he may designate, at a time he shall spcify, and shall make such reasonable rules governing the conduct of conferences as he may deem meet and proper. The discretion herein given to the Commissioner shall be reasonably exercised on all occasions.

SECTION 31. Final Assessments. In all cases in which protests are filed by taxpayers, as provided by law, the Commissioner shall consider the information contained in such pro-

tests and information submitted by taxpayers in conferences or hearing before the said Commissioner, his officers or agents, and shall proceed to make final assessment or to fix a final license fee and notify the taxpayer of the amount thereof, subject to the right of appear as provided in this Act.

SECTION 45. Review of Board's decision. Jurisdiction of the Superior Courts. The findings by the Board of Tax appeals shall not be final; but either party may appeal from any order, ruling, or finding of the said Board to the Superior Court of the county of the residence of the taxpayer unless the taxpayer be a railroad or other public service corporation or non-resident, in which event the appeal of either party shall be to the Superior Court of the County in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office. The appeal and necessary records shall be certified and transmitted by the Chairman of the Board and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment by the Board. The procedure provided by law for applying for and granting appeal from the Court of Ordinary to the Superior Court shall apply as far as suitable to the appeal authorized herein, except that the appeal authorized herein may be filed within fifteen (15) days from the date of judgment by the Board.

Before the Superior Court shall have jurisdiction to entertain such appeal filed by any aggrieved taxpayer, such taxpayer shall file with the Clerk of the Superior Court a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability and shall within thirty (30) days from the date of judgment by the Board file with the Clerk of the Superior Court, except where appellant owns real property in Georgia, the value of which is in excess of the amount of the tax in dispute, bond in amount satisfactory to such Clerk or other security in amount satisfactory to such Clerk conditioned to pay any tax over and above that which the taxpayer has admitted liability for which shall be found to be due by a final judgment of court, together with interest and costs.

It shall be ground for dismissal of the appeal if the taxpayer fails to pay all taxes admittedly owed upon the due date or dates as now or hereafter provided by law.

If the final judgment of court places upon the taxpayer any tax liability which he has not already paid, he shall pay the same on the due date or dates now or hereafter fixed by law if the tax or any of same has not become due on the date of said final judgment of court. And if the tax or any of the same has already become due at the time of final judgment of court, the taxpayer shall immediately pay the tax or so much thereof as has already become due, with interest, and shall pay the court costs, in the event the final judgment of court is adverse to the taxpayer, no matter whether the tax or any part of same has or has not become due at the time of said final judgment of court.

Sections 18, 19 and 20, taken from Act of February 17, 1943, (Georgia Laws 1943, page 204), amending Act of January 3, 1938, (Georgia Laws 1937-38, Ex. Sess., page 77):

"'SECTION 18. Except as otherwise provided by this Act, all matters, cases, claims and controversies, of whatsoever nature arising in the administration of the revenue laws, or in the exercise of the jurisdiction of the State Revenue Commissioner or the Department of Revenue, as conferred by this act, shall be for determination by the State Revenue Commissioner, subject to review by the court as provided by Section 45 of Chapter IV of this Act. The effect of this section shall be that, except as hereinafter provided, all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review under Section 45 of this act in the same manner, under the same procedure, and as fully, as if same had been considered and passed upon by the Board of Tax Appeals. Any such appeal from a final ruling, order, or judgment of the State Revenue Commissioner shall be entered within the time prescribed by Section 45 of the Act; Provided, however, that nothing herein contained, and no provision of this Act, shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an

assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality.

" 'All petitions for review filed and now pending before the Board of Tax Appeals shall be and they are hereby declared to be in the same position as if the ruling, order, finding or assessment of the Commissioner therein complained of and sought to be reviewed had been affirmed by the Board of Tax Appeals; and all such rulings, orders, findings or assessments now pending for review before the Board of Tax Appeals shall be final and conclusive unless the taxpayer who filed said petition for review shall, within thirty (30) days from the date of the passage of this Act, appeal said ruling, order, finding or assessment to the Superior Court in the manner provided by Code Section 92-8446, except that in the case of a foreign corporation domesticated in Georgia the appeal shall be made within the time herein prescribed to the Superior Court of the County in which such foreign corporation was domesticated in Georgia.'

" 'SECTION 19. The provisions of the foregoing section with reference to reviewing assessments of the State Revenue Commissioner shall not apply to assessments for ad valorem taxation against any person, corporation or company which was required by Chapter 92-59 of the Code of 1933 to return his or its property for ad valorem taxation to the Comptroller General and is now required by such chapter and this Act of January 3, 1938, to make such returns to the State Revenue Commissioner. The State Revenue Commissioner shall carefully scrutinize such returns made to him, and if in his judgment the property embraced therein is returned below its value or the return is false in any particular, or in any wise contrary to law, he shall, within sixty days thereafter, correct the same and assess the value, from any information available. If any such person, corporation or company shall be dissatisfied with the assessment or correction of such returns as made by the State Revenue Commissioner or the Department of Revenue, such taxpayer shall have the privilege, within twenty days after notice of such assessment and correction, to refer the question of true value or amount to arbitrators as pro-

vided for by Chapter 92-60 of the Code of Georgia of 1933. Such arbitrators shall consist of one chosen by the taxpayer and one chosen by the Governor. If the arbitrators thus chosen shall be in disagreement, they shall choose an umpire. If such arbitrators disagree and fail to select an umpire within thirty days after receiving notice of their appointment, the Chief Justice of the Supreme Court of Georgia shall select an umpire. Every arbitrator or umpire chosen hereunder shall be a citizen of Georgia. The award shall be made by the arbitrators or by the arbitrators and the umpire, as the case may be, within thirty days from the appointment or selection of such umpire. The decision and award of the arbitrators or of the arbitrators and the umpire shall be subject to appeal and review in the same manner as decisions and orders of the State Board of Tax Appeals were subject to appeal and review under the terms of Section 45 of This Act.'

" 'SECTION 20. Sections 92-7004 to 92-7006 of the Code of Georgia of 1933, which relate to arbitration of State Revenue Commission's equalization of county assessments are hereby repealed. Chapter 92-60 (Section 92-6001 to 92-6007) of the Code of Georgia of 1933, as modified by the provisions of the foregoing Section 19, shall continue and remain in full force and effect as if fully set forth herein.' ".